Supreme Court, U.S.
FILED

No.

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In The

Supreme Court of The United States

OFFICE OF THE CLERK

LINDA PUGLISI, individually, ANN LANDAU, individually, FRANCIS X. FARRELL, individually, JOHN SLOAN, individually, THOMAS WOOD, individually, and the TOWN OF CORTLANDT, New York,

Petitioners,

- against -

ROBERT L. PAVONE and VALERIE V. PAVONE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION

George S. Hodges*
John J. Walsh II
Edmund V. Caplicki, Jr.
Paul E. Svensson
HODGES WALSH & SLATER LLP
55 Church Street — Suite 211
White Plains, NY 10601
(914) 385-6000
Attorneys for Petitioners

*Counsel of Record

Appeal Press - (914) 761-3600 (212) 267-6602 (14410)

QUESTION PRESENTED

The Second Circuit reversed the Order of the Honorable Cathy Seibel, District Judge for the Southern District Court of New York, and mandated that Respondents be granted permission to file a Second Amended Complaint to replead their claim of First Amendment retaliation.

The Second Circuit held that the district court abused its discretion by taking as true all allegations made by the Respondents in their First Amended Complaint while assessing the plausibility of Respondents' claim on a motion for dismissal, without granting permission sua sponte to further amend after the court determined plaintiffs failed to state a plausible cause of action.

The Question Presented:

Does a district court abuse its discretion when it fails to sua sponte grant leave to replead a First Amended Complaint which contains insufficient allegations to render a claim of First Amendment retaliation plausible before dismissing the claim pursuant to a motion on the grounds of qualified immunity?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

The Town of Cortlandt, New York is a municipal entity organized under the laws of the State of New York. The Town does not have a parent company or issue stock, and no publicly held company has any ownership in the Town.

The individually named Petitioners are private citizens and public officials serving in elected and appointed capacities on behalf of the Town.

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Appendix B — Judgment of the United States District Court Southern District of New York dated December 23, 2008 (Hon. Cathy Seibel, U.S.D.J.).

Appendix C — Memorandum Decision and Order of the United States District Court Southern District of New York dated December 4, 2008 (Hon. Cathy Seibel, U.S.D.J.).

OPINION BELOW

The Second Circuit reversed the Order of the district court, and mandated that Respondents be granted permission to file a Second Amended Complaint to replead their claim of First Amendment retaliation. The Second Circuit held that the district court had abused its discretion in failing to sua sponte grant permission to file a Second Amended Complaint after it determined that the First Amended Complaint failed to state a plausible cause of action for First Amendment retaliation. (See Appendix A and B).

JURISDICTION

This Court's Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution Title 42 U.S.C. § 1983

STATEMENT OF THE CASE

In 1999, Robert Pavone commenced a civil rights action, Pavone v. Wood, 99-CV-4991 (CLB), for violation of his First Amendment rights. The action was settled and resulted in, among other

things, a 207-c [1]
Stipulation ("Stipulation") obligating the Town to pay Mr. Pavone's salary until his application for retirement disability "incurred in the performance of duty" or "accidental disability" was granted or he exhausted his administrative remedies.

Mr. Pavone agreed to be bound by the determination of the Comptroller on behalf of the New York State Retirement System with respect to his applications.

Mr. Pavone also "expressly acknowledged that if he fails to receive a disability retirement having exhausted his administrative remedies prior to an Article 78 proceeding, that The Town of Cortlandt may unilaterally discontinue his 207-c salary benefits without the need of an administrative hearing."

On March 10, 2000, the New York State Comptroller's Office announced that Mr. Pavone's application for "accidental disability retirement" was administratively denied. On April 23, 2005, the New York State Comptroller's Office advised the Town that Mr. Pavone's application for "performance of duty disability retirement" was denied.

On June 14, 2006, the New York State Comptroller's Office advised that the denial of

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[1] New York General Municipal Law § 207-c ("207-c") provides in substance that police officers (or certain other municipal civil servants) who become disabled from an injury sustained in the performance of their duties, are entitled to the full amount of their salary and to medical costs paid by the municipality until the disability ceases or if the police officer is granted an accidental disability retirement.

"performance of duty" disability benefits was the subject of an Article 78 proceeding. In addition, the Comptroller reported that Mr. Pavone did not request a hearing on the administrative denial for "accidental disability retirement" benefits and that the time to do so had passed.

In May 2007, Ms. Pavone became the White Collar Representative for her Union. In that capacity she advocated on behalf of the Union and its members with respect to a number of matters.

On August 13, 2007, the Town Board requested that outside counsel ("Bond") make a recommendation whether or not it may terminate the 207-c benefit. On January 10, 2008, Bond received confirmation from Mr. Pavone's attorneys that the Article 78 would not be perfected.

On January 31, 2008, Bond advised the Town that under the 207-c Stipulation, and based upon the denial of the performance of duty and accidental disability applications, the Town Board would not be violating the Stipulation if it acted to discontinue Mr. Pavone's benefits. On February 25, 2008, the Town Board adopted resolution #68-08 as recommended by Bond.

Ms. Pavone resigned as the Union White Collar Representative effective March 8, 2008 without any allegation that her speech was chilled.

Respondents filed an Amended Complaint ("Complaint" or "First Amended Complaint") on May 19, 2008, alleging violations of Plaintiffs' First and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983. As relevant to this Writ, the remaining federal causes of action alleged a violation of Mr. Pavone's First Amendment rights on the basis of third-party standing through the termination of his 207-c benefits in retaliation for

Ms. Pavone's exercise of her First Amendment right of association; and Ms. Pavone's personal exercise of her First Amendment right of association.

The individual Petitioners' motion for dismissal based on qualified immunity was granted by the district court, finding that Respondents failed to state a plausible cause of action for First Amendment retaliation. (Appendix C). The Town's oral motion for dismissal was granted without prejudice. (Appendix D).

The Second Circuit Court of Appeals decided Respondents' appeal on November 19, 2009, issuing same as a mandate on December 11, 2009. (Appendix A and B).

ARGUMENT
REASONS FOR ALLOWANCE OF THE WRIT

The Second Circuit decision ignores the Supreme Court's interpretation of Rule 8. Instead of following the rule set down in Ashcroft v. Iqbal., 129 S.Ct. 1937 (2009), the Second Circuit has concluded that a pleader must be granted leave sua sponte by the district court to further amend his once amended pleadings after they are found to be implausible upon a motion for qualified immunity.

In making its decision, the Second Circuit relied upon Cortec Indust., Inc. v. Sum Holding, L.P., 949 F.2d 42, 48 (2d Cir.1991). Previous to the use herein, Cortec had been cited exclusively for its ruling as to which documents a district court may consider when disposing of a Rule 12(b)(6) motion.

Cortec also involved an appeal by the plaintiff from an order of the district court that denied an application for leave to appeal. In this regard, the Cortec court opined, "[a] party may amend its

pleading once as a matter of right before a responsive pleading has been served, otherwise by leave of the court, and such 'leave shall be freely given when justice so requires.' Rule 15(a). It is the usual practice upon granting a motion to dismiss to allow leave to replead. Although leave to amend a complaint is within the discretion of the district court, refusal to grant it without any justifying reason is an abuse of discretion." Id. at 48 (internal citations omitted).

In the instant case, Respondents previously obtained leave of court to amend after a responsive pleading had been served, resulting in the First Amended Complaint, the pleading reviewed by the district court on the motion for qualified immunity.

Respondents never requested an opportunity to further amend their First Amended Complaint in opposition to the qualified immunity motion. Moreover, Respondents did not raise the issue on appeal.

As such, the facts in the instant matter are inapposite to those which framed the court's dicta in Cortec.

While the Second Circuit reviews the grant of summary judgment on appeal de novo, the court should have deemed the issue of further amendment of a pleading waived because it was not preserved nor addressed in the Respondents-Appellants' brief. Frank v. United States, 78 F.3d 815, 832-3 (2d Cir.1996), *vacated on other grounds*, 521 U.S 1114 (1997).

The instant matter will not be the first from the Second Circuit to be argued before this Court on the standard of review to be used when assessing the plausibility of claims raised in a Complaint.

In Bell Atlantic Corp. v. Twombly, 550 U.S.

544 (2007), in the context of a Sherman Act antitrust claim, the Supreme Court reversed the holding of the Second Circuit.

The Second Circuit, in addressing a motion to dismiss an Amended Complaint under Rule 12(b)(6), opined that "[a] complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Bell Atlantic Corp. v. Twombly, 425 F.3d 99, 106, 119 (citing Todd v. Exxon Corp., 275 F.3d 191, 197-98 [quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)])(2d Cir.2005).

The Second Circuit was "mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be re-calibrated, however, it is Congress or the Supreme Court that must do so." Id. at 117.

The Second Circuit held that "short of the extremes of "bare bones" and "implausibility," a complaint in an antitrust case need only contain the "short and plain statement of the claim showing that the pleader is entitled to relief' that Rule 8(a) requires. Id. at 111.

Therein, the Second Circuit also opined that dismissal of a complaint without permitting plaintiff to amend their complaint would be

improper. Id. at 110 (citing Klebanow v. N.Y. Prod. Exch., 344 F.2d 294, 299-300 (2d Cir.1965)).

The Supreme Court, in reversing, opined that "dismissal for failure to state a claim upon which relief may be granted does not require appearance, beyond a doubt, that plaintiff can prove no set of facts in support of claim that would entitle him to relief' and, instead, found that "the complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible." Twombly, 550 U.S. at 569.

Understandably, the Supreme Court did not address the dicta of the Second Circuit that dismissal of the complaint without permitting plaintiff to amend his complaint would be improper.

In the instant matter, the Second Circuit has raised its dicta to the level of law, finding that the lower court abused its discretion in failing to sua sponte offer Respondents the opportunity to replead their First Amended Complaint after detailing its lack of plausibility.

As such, it is respectfully submitted that the Court accept this Petition to re-establish the proper balance lacking in the Second Circuit's analysis.

In Twombly, the Supreme Court found "absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general 'short and plain statement of the claim' mandate in Rule 8(a) should control ... [a]nd Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." Id.

Thus, the Supreme Court set forth the rule that a complaint must contain "enough facts to state

a claim to relief that is plausible." Id. at 570 (overturning Conley).

While the Supreme Court did not apply a "heightened pleading standard ... [o]n certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires." Id. at 569.

The defense of qualified immunity is well established as a means of limiting abusive litigation against public officials. However, given the Second Circuit's ruling, public officials will be forced to file a motion to dismiss based on qualified immunity, face the prospect of the district court detailing the deficiencies in the plaintiff's Complaint and then granting plaintiff the opportunity to file an Amended Complaint with allegations that will withstand motion and lead to the further expense and time of litigation; the very process that qualified immunity is intended to prevent.

In Ashcroft, supra, the Supreme Court overruled the Second Circuit for a second time.

The Second Circuit found "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in Twombly. Ashcroft v. Iqbal, 490 F.3d 143, 155 (2d Cir.2007).

As a result, the Second Circuit interpreted the Supreme Court as "requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible. Id. at 157-58 (emphasis in original).

The circuit court also opined that "some elements of a plaintiffs claims might need to be

fleshed out by a plaintiffs response to a defendant's motion for a more definite statement. See Fed.R.Civ.Proc. 12(e). In addition, even though a complaint survives a motion to dismiss, a district court, while mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation, may nonetheless consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiffs claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct." Id. at 158.

Upon granting certiorari, the proposed case management approach was rejected by the Supreme Court because "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.' (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991)). 129 S. Ct. at 1953.

In the instant matter, the Second Circuit has bypassed the disfavored case management approach, and held that the district court abused its discretion by failing to provide plaintiffs with the opportunity to further amend its claim once its has been determined to lack plausibility. This is simply another procedural mechanism that the Second Circuit has attempted to mandate to avoid following the rulings of the Supreme Court.

The decision in Twombly was based upon this Court's interpretation of Rule 8, and was not limited to pleadings made in the context of an antitrust dispute. Id.

As the Court instructed, "Rule 8 ... does not

unlock the doors of discovery for a plaintiff armed with nothing more than conclusions [and] only a complaint that states a plausible claim for relief survives a motion to dismiss. 550 U.S. at 556.

Determining whether a Complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d. at 157-158.

However, where the well-pleaded facts do not permit a court to infer more than the mere possibility of misconduct, the Complaint has not demonstrated that the pleader is entitled to relief. 550 U.S. at 1949-50.

As such, the rule set forth in Twombly governs the pleading standard in all civil actions. In order to survive a motion to dismiss, a Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. 129 S. Ct. at 1949.

Multiple circuit court decisions reflect a uniform following of that rule. See e.g., McTernan v. City of York, Penn., 577 F.3d 521 (3d Cir.2009); Floyd v. City of Kenner, La., slip copy, 2009 WL 3490278 (5th Cir.2009)(dismissal on grounds of qualified immunity following Ashcroft); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., F.3d , 2009 WL 5126224 (4th Cir.2009)(in reviewing an amended complaint under Ashcroft, the court did not mandate that plaintiff be offered another opportunity to replead claim); Brown v. JP Morgan Chase Bank, 334 Fed.Appx. 758 (7th Cir.2009); Braden v. Wa1-Mart Stores, Inc., 588 F.3d 583 (8th Cir.2009); Moss v. U.S. Secret Service, 572 F.3d 962 (9th Cir.2009); Waters Edge Living, LLC v. RSUI Indem. Co., slip order, 2009 WL 4366031 (11th

Cir.2009).

Further, the Supreme Court and these circuit courts, unlike the Second Circuit, have not directed that a plaintiff be permitted to amend his Complaint after dismissal on a motion for qualified immunity, and has not held that a court abuses its discretion in failing to grant leave sua sponte. See e.g., Arar v. Ashcroft, 585 F.3d 559 (2d Cir.2009)(following Ashcroft only where Arar rejected an opportunity to replead); Pavone, supra (mandating that the district court provide plaintiff an opportunity to replead his claim after finding that the Complaint was implausible).

CONCLUSION

It is respectfully requested that the Court accept this Petition, and find that public officials are entitled to qualified immunity when the plaintiff is unable to state a plausible claim on a motion for dismissal, instead of requiring the court sua sponte to offer plaintiff the opportunity to replead after the court has spelled out the deficiencies in his claims.

In the instant case, the Second Circuit has continued to interpret Ashcroft and Twombly to fit its expansive agenda and, as such, it is respectfully submitted that this Court must accept this Petition and finally determine whether a district court must sua sponte grant permission to a party to replead once it determined that a complaint fails to state a plausible cause of action.

Dated: January 14, 2010
White Plains, New York

Respectfully submitted,
HODGES WALSH & SLATER, LLP

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George S. Hodges, Esq.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT,

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of November, two thousand nine.

PRESENT:
WILFRED FEINBERG,
DEBRA ANN LIVINGSTON,
Circuit Judges.
JOHN G. KOELTL,
District Judge

Filed
November 19, 2008

ROBERT L. PAVONE,

Plaintiff-Counter-Defendant-Counter-Claimant-Appellant,

VALERIE, V. PAVONE,

Plaintiff-Appellant,
No. 09-0109-cv

LINDA PUGLISI, individually, ANN LINDAU, individually, FRANCIS X. FARRELL, individually, JOHN SLOAN, individually and THOMAS WOOD, individually,
Defendants-Counter-Defendants-Appellees,

TOWN OF CORTLANDT,

Defendant-Counter-Claimant-Counter-Defendant-Appellee.

ISSUED AS MANDATE:

Drita Nicaj (Jonathan Lovett and Kim Berg, *on the brief*), Lovett &Gould, LLP, White Plains, NY, *for Plaintiffs-Appellants.*

Paul E. Svensson, Law Offices of Edmund V. Caplicki, Jr.,*for Individual Defendants-Appellees.*

Hodges Walsh & Slater LLP, *for Defendant Appellee Town of Cortlandt.*

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be AFFIRMED in part and VACATED and REMANDED in part.

Plaintiff-Counter-Defendant-Counter-Claimant-Appellant Robert L. Pavone and Plaintiff-Appellant Valerie V. Pavone ("Plaintiffs") appeal from the December 4, 2008, grant of summary judgment by the United States District Court for the Southern District of New York (Seibel, J.) on the basis of qualified immunity in favor of Defendants-Counter-Defendants-Appellees Linda Puglisi, Ann Lindau, Francis X. Farrell, John Sloan, and Thomas Wood in their individual capacities ("Defendants") with respect to Plaintiffs' claims under 42 U.S.C. §1983, and the judgment of the same court entered December 23, 2008, dismissing the complaint against Defendant Counter-Claimant-Counter-Defendant-Appellee Town of Cortlandt ("Town"). On appeal, Plaintiffs argue that the district court erred in its determination that Plaintiffs failed to state valid constitutional claims under the First Amendment, in its failure to analyze Plaintiffs' intimate association claim and chilling claim, in its finding of qualified immunity for Defendants with respect to Plaintiffs' due process claim, and in its dismissal of the complaint without

addressing Plaintiffs' state law claims.[1] We assume the parties' familiarity with the underlying facts, procedural history, and specification of the issues on appeal.

We review the grant of summary judgment on appeal *de novo*. *Howley v. Town of Stratford*, 217 F.3d 141, 151 (2d Cir. 2000). Summary judgment is appropriate when, after all evidence is construed in the light most favorable to the non-moving party, there is no genuine issue of material fact. *June v. Town of Westfield, New York*, 370 F.3d 255, 257 (2d Cir. 2004). We also review the decisions of the district court with respect to qualified immunity *de novo*. *Jones v. Parmley*, 465 F.3d 46, 55 (2d Cir. 2006). The appropriate inquiry is an objective one: whether a reasonable official could have believed that his actions were lawful in light of clearly established law and the information he possessed *Kelsey v. County of Schoharie*, 567 F.3d 54, 61 (2d Cir. 2009). Summary judgment maybe granted on the "basis of a qualified immunity defense premised on an assertion of objective reasonableness [if] the defendant show[s] that no reasonable jury, viewing the evidence in the light most favorable to the [p]laintiff, could conclude that the defendant's actions were objectively unreasonable in light of clearly established law." *0 'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003) (second alteration in original) (quoting *Ford v. Moore*, 237 F.3d 156, 162 (2d Cir. 2001.)When specific intent is an element of the plaintiffs claim, it is never objectively reasonable for a government official to act with the prohibited intent. *Reuland v. Hynes*, 460 F.3d 409, 419 (2d Cir. 2006).

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[1] Plaintiffs do not address their equal protection claim or their claim that Defendants refused to provide data to the New York State Retirement System in a retaliatory manner in their briefing. We therefore deem these claims to be waived. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

We first address the First Amendment retaliation claim. Judge Brieant's May 16, 2008 scheduling order required Defendants to make a motion to dismiss on the basis of qualified immunity after deposing Plaintiffs and before any further discovery took place. The Plaintiffs allege that the Defendants acted with the improper intent to retaliate against Mr. Pavone for Mrs. Pavone's protected speech — an allegation that, if true, would preclude a finding of objective reasonableness. *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001). Because Plaintiffs had been afforded no discovery of the Defendants, the district court assessed this claim taking as true the allegations in the First Amended Complaint.

In order to allege a *prima facie* case of First Amendment retaliation, a plaintiff must adequately aver that his speech was constitutionally protected, that he suffered an adverse action, and that a causal connection existed between his speech and the adverse action. *See Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). We agree with the district court that Plaintiffs failed to allege properly such a case. Although a causal connection between an adverse action and protected speech may be indirectly established by showing that protected activity was followed closely in time by the adverse action, *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001), a plaintiff must still allege that defendants were aware of the protected activity, *see Espinal v. Goord*, 558 F.3d 119, 129-30 (2d Cir. 2009). Even were we to calculate the time period in this case in the most favorable manner to Plaintiffs, reducing it to three months - a time short enough to infer causality in some cases, *see, e.g., Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45-46 (2d Cir. 1980) — Plaintiffs have not met this standard. Without further allegations regarding the nature and timing of Mrs. Pavone's speech, the Town's awareness of the speech, or other facts sufficient to support an inference that protected conduct played a role in the alleged adverse actions

taken against Mr. Pavone, Plaintiffs have not sufficiently pleaded a claim of retaliation.

Plaintiffs argue that the district court failed to address Mr. Pavone's intimate association claim and Mrs. Pavone's chilling claim and should be reversed for further consideration of those claims. We disagree. Both intimate association and chilling claims also require a plaintiff to allege causation between the speech act and the adverse action taken by a defendant. *See Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); *Adler v. Pataki*, 185 F.3d 35, 44 (2d Ch.1999). Because the district court correctly found that Plaintiffs had not adequately alleged such causation, as discussed above, it properly dismissed the intimate association and chilling claims.

Nevertheless, we vacate and remand to the district court on the First Amendment retaliation, intimate association, and chilling claims because the district court failed to allow Plaintiffs leave to replead their claims. Although Defendants moved for summary judgment on the basis of qualified immunity, the limitations imposed by Judge Brieant's scheduling order led the district court to analyze the issue of Defendants' intent under the standard of a motion to dismiss, considering only the allegations in the First Amended Complaint. "It is the usual practice upon granting a motion to dismiss to allow leave to replead. Although leave to replead is within the discretion of the district court, refusal to grant it without any justifying reason is an abuse of discretion." *Cortec Indus., Inc.v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (internal citations omitted). Therefore, we remand with instructions to dismiss the First Amendment claims without prejudice and permit Plaintiffs an opportunity to replead these claims.

With regard to Plaintiffs' due process claim, we conclude that the district court properly held that Defendants' behavior in terminating Mr. Pavone's 207-c benefits without a pre-deprivation hearing was objectively reasonable. As the district court correctly found, the language of the 207-c Stipulation clearly provides that the Town was permitted to discontinue

Mr. Pavone's 207-c benefits without an administrative hearing. The advice of counsel that the Town had a "solid argument that the Stipulation [would not be] violated" if benefits were terminated provides further reasonable justification for Defendants' belief that no hearing was required. Finally, we find that the district court erred in dismissing Plaintiffs' state law claims with prejudice. The district court, in granting the oral motion of the Town to dismiss, provided that Plaintiffs' claims could be reinstated if this Court were to reverse the qualified immunity rulings. It did not, however, either rule on the merits of the state law claims or decline to exercise supplemental jurisdiction over them. On remand, the district court should decide any motions directed to the state law claims. We express no opinion on the issue of whether the district court should exercise supplemental jurisdiction because that, in turn, involves the question of whether any federal claims remain. We do note that if state claims are dismissed because the district court does not exercise supplemental jurisdiction, such claims should be dismissed without prejudice. *See Chanayil v. Gulati*, 169 F.3d 168, 171-72 (2d Cir. 1999).

All arguments not otherwise discussed in this summary order are found to be moot or without merit.

For the foregoing reasons, the judgment of the district court is hereby vacated and remanded with respect to the First Amendment claims and the state law claims. In all other respects the judgment is affirmed.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
By: Frank Perry

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT L. PAVONE and
VALERIE V. PAVONE,

Plaintiffs,

Memorandum Decision and Order
08-CV-23 89 (CS)

- against -

LINDA PUGLISI, individually, ANN LINDAU, individually, FRANCIS X. FARRELL, individually, JOHN SLOAN, individually, THOMAS WOOD, individually, and the TOWN OF CORTLANDT, New York,

Defendants.

Appearances:

Jonathan Lovett
Lovett & Gould, LLP
White Plains, New York
Counsel for Plaintiffs

Edmund V, Caplicki
Law Offices of Edmund V. Caplicki, Jr.
Lagrangeville, New York
Counsel for Individual Defendants

Seibel. J.

Before the Court is Defendants' July 18, 2008 Motion for Summary Judgment on the basis of qualified immunity. (Doc. 22.)

I. Background

Plaintiffs Robert L. Pavone, former Chief of Police of the Town of Cortlandt, and his wife Valerie V. Pavone, White Collar Representative of the AFSCME Local 2343 ("Union"), filed an amended complaint ("Complaint") on May 19, 2008, alleging violations of Plaintiffs' First and Fourteenth Amendment rights. (Compl. ¶¶ 1, 3.) The Complaint asserts claims pursuant to 42 U.S.C. § 1983 against the Town of Cortlandt ("Town") and several individuals, who are sued in their official and personal capacities: the Town Supervisor and Board Member Linda Puglisi; Town Board Members Ann Lindau, Francis X. Farrell and John Sloan; and Town Attorney Thomas Wood (collectively, "Individual Defendants". (*Id.*¶¶ 3-9,)

In 1999, Plaintiff Robert Pavone commenced a civil rights action, *Pavone v. Wood*, 99- CV-4991 (CLB), against Defendant Thomas Wood and others for violation of his First Amendment rights. (Compl. ¶ 10.) That action was eventually settled (*id*,¶11), and resulted in, among other things, a 207-c[1] Stipulation ("Stipulation") between Mr. Pavone and the Town pursuant to which the Town was obligated to: (1) pay the costs of health care coverage for Mr. Pavone and his family under the terms of the Union Bargaining Agreement, and (2) pay the amount of Mr. Pavone's salary until his application for retirement disability was granted or he exhausted his administrative

[1]. New York General Municipal Law § 207c ("Section 207-c) provides in substance that police officers (or certain other municipal civil servants), who are injured in the performance of their duties and become ill as a result, are entitled to the full amount of their salary and to medical costs paid by the municipality until the disability ceases. Section 207-c also provides, among other things, that such payments will cease if the police officer is granted an accidental disability retirement, or if he or she refuses to perform light police duty, if it is available and offered to him or her.

remedies, not including an Article 78 proceeding,[2] in connection therewith, (*id.*¶¶ 12-13; Caplicki Reply Affirmation ¶6; Statement of Facts, Ex. K ¶¶ 1-2, 7).

In May 2007, Ms. Pavone became the White Collar Representative for her Union. (Compl.¶¶ 3, 14) In that capacity she advocated on behalf of the Union and its members against the Town with respect to a number of issues. (*id* ¶14.) Plaintiffs allege that, in retaliation for her actions as the White Collar Representative and in an attempt to inhibit her associational rights, Defendants entered into an agreement on February 25, 2008, pursuant to which they resolved to summarily terminate Mr. Pavone's 207-c benefits without a pre-deprivation due process hearing. (*Id*, ¶¶ 15-16.) Mr. Pavone's 207-c benefits were terminated on March 7, 2008. (*Id.* ¶16.) Plaintiffs assert that this action was in contravention of the 207-c Stipulation because Mr. Pavone had not exhausted all of administrative remedies in connection with his application for disability retirement and was not given a pre-deprivation hearing. (*Id.*) Due to this purported economic retaliation, Ms. Pavone resigned as the Union White Collar Representative effective March 8, 2008, and alleges that she will not engaged in further associational activities with respect to the Town or the Union. (Id. ¶17.) Plaintiffs allege that shortly after this action was commenced, Defendants took further retaliatory action by refusing to provide to New York State the documentation required for the processing of Mr. Pavone's non-disability retirement application, and refusing the payment of Workers' Compensation benefits to Mr. Pavone. (*Id.*¶ 19,)

Plaintiffs bring causes of action for alleged violations of: (1) Mr. Pavone's First Amendment rights on the basis of third-party standing through the termination of his 207-c benefits in retaliation for Ms. Pavone's exercise of her First Amendment right of

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[2] Article 78 of the Civil Practice Law and Rules is the principal vehicle in New York for judicial review of administrative action. N.Y. Jur. § 338.

association; (2) Ms. Pavone's First Amendment right of association through the same means; (3) Mr. Pavone's First and Fourteenth Amendment rights of intimate association through the same means; (4) Mr. Pavone' s Fourteenth Amendment right to equal protection through termination of his 207-c benefits under circumstances in which the benefits of other allegedly similarly-situated persons were not terminated; (5) Mr. Pavone's Fourteenth Amendment right to due process through the termination of his 207-c benefits without a pre-deprivation hearing; (6) Mr. Pavone's unspecified First Amendment rights through the retaliatory refusal to provide information to the State for the processing of his non-disability retirement application; and (7) Mr. Pavone's unspecified First Amendment rights through retaliatory denial of Workers' Compensation benefits. (*id.*¶¶ 21-36.)[3]

On July 18, 2008, the Individual Defendants filed a motion seeking summary judgment pursuant to Fed. R. Civ. P. 56 on the basis of qualified immunity. (Doc. 22.) They argue that they are entitled to qualified immunity because: (1) they acted in good faith, without malice, and in reasonable reliance on the advice of counsel when they, in the exercise of their discretion, terminated Mr. Pavone's 207-c benefits; (2) there is no evidence they acted in retaliation for Ms. Pavone's activities; (3) Ms. Pavone's speech was not chilled, but rather she freely decided to resign her position, creating a self-imposed ban on her speech; (4) they in fact provided to the New York State Retirement System all requested materials relating to Mr. Pavone's disability application; and (5) Mr. Pavon's request for Workers' Compensation from the Town has not been decided and is not, therefore, properly at issue in this action.

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[3] Mr. Pavone also asserts state law causes of action for (1) breach of contract arising from termination of his 207-c benefits in violation of the terms of the 207-c Stipulation, and (2) breach of contract through an alleged reduction in health benefits in violation of the terms of the 207-c Stipulation. (Id.¶¶ 37-41.)

On July 30, 2008, Plaintiffs filed a Cross Motion to Dismiss the Qualified Immunity Motion on the basis that Defendants waived any pre-trial qualified immunity defense because they failed to comply with Judge Charles Brieant's May 16, 2008 Scheduling Order, which provides that, if Defendants plan to assert a qualified immunity defense, they must depose Plaintiffs within thirty days of the issuance of the Scheduling Order and, within thirty days of the deposition, file a motion to dismiss on the basis of qualified immunity.[4] On September 17, 2008, I denied the Cross Motion and ordered Plaintiffs to serve an opposition to Defendants' Motion for Summary Judgment and Defendants to serve a reply; (Doc. 30.) Plaintiffs filed an opposition to the Motion for Summary Judgment on September 29, 2008 (Doc. 34), and Defendants filed their reply on October 7, 2008 (Doc. 35). Oral argument was heard on November 21, 2008.

II. Discussion

A. Legal Standards

1. Summary Judgment

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.* On a motion for summary judgment, courts must

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[4] Judge Brieant passed away in July 2008, and the case was reassigned to me on August 5, 2008. (Dec. 29.)

"resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment." *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir, 2001) (internal quotation marks omitted). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to present evidence sufficient to satisfy every element of the claim. *Holcomb v. Iona Colt*, 521 F.3d 130, 137 (2d Cir. 2008) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317,323 (1986)). "[S]ummary judgment should only be granted if after discovery, the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof." *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) (internal quotation marks, emphasis and alterations omitted).

A party opposing a properly made motion for summary judgment "may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule - set forth specific facts showing a genuine issue for trial." Fed .R. Civ. P. 56(e); *accord Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir. 2004); *Menes v. City Univ. of NY. Hunter Coll.*, No. 06-CV-6358, 2008 U.S. Dist. LEXIS 73304, at *30 (S.D.N.Y. Sept. 25, 2008) ("non-moving party cannot rely on mere allegations, denials, conjectures, or conclusory statements"). In ruling on a motion for summary judgment, the district court may rely only on "material that would be admissible or usable at trial." *Major League Baseball Props., Inc. v. Salvino, Inc*„ 542 F.3d 290, 309 (2d Cir. 2008). Accordingly, hearsay testimony that would be inadmissible at trial may not properly be set forth in a Rule 56(e) affidavit. *Id.* at 310.

2. Qualified Immunity

The doctrine of qualified immunity "shields public officials `from liability for civil damages insofar as their conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known.'" *Salahuddin v. Goord*, 467 F.3d 263, 273 (2d Cir. 2006) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

> Because the immunity not only protects against a judgment for damages but also is in part an entitlement not to be forced to litigate, early resolution of the qualified immunity defense is encouraged, and a defendant may properly move for summary judgment dismissing the plaintiffs claim on that basis where there are no genuinely disputed factual issues material to the defense.

Munafo v Metro. Transp. Auth., 285 F.3d 201, 210 (2d Cir. 2002) (internal citations and quotations marks omitted),

> A government official sued in his individual capacity is entitled to qualified immunity (1) if the conduct attributed to him was not prohibited by federal law; or (2) where that conduct was so prohibited, if the plaintiffs right not to be subjected to such conduct by the defendant was not clearly established at the time it occurred; or (3) if the defendant's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken.

Id. (internal citations and quotations marks omitted); *accord Russo v. City of Bridgeport*, 479 F.3d 196, 211 (2d Cir. 2007) (qualified immunity protects public officials from liability for civil damages where defendant's action did not violate clearly established law, or "it was objectively reasonable for the defendant to believe that his action did not violate such law"). Qualified immunity "provides ample protection to all

but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 US 335, 341 (1986).

Summary judgment should be granted on the basis of a qualified immunity defense where the defendant shows that no reasonable jury, viewing the evidence in the light most favorable to the plaintiff, could conclude that the defendant's actions were objectively unreasonable in light of clearly established law. *Husain v. Springer*, 494 F.3d 108, 131 (2d (Cir. 2007). In some circumstances, reliance on the advice of counsel may suffice to establish qualified immunity, *Lukas v, Triborough Bridge & Tunnel Auth*, No. 92-CV-3680, 1993 U.S. Dist LEXIS 21065, at Aug. 11, 1993), such as where counsel's advice objectively precludes a reasonable defendant from the knowledge that he or she is violating federal law, *Ponterio v.Kaye*, No. 06-CV-6289, 2007 U.S. Dist. LEXIS 65350, at *27-28 (S.D.N.Y. Sept. 6, 2007); *see Cahill v. O'Donnell*; 7 F. Stipp. 2d 341, 351 n.6 (S.D.N.Y. 1998) (reliance on advice of counsel is relevant to qualified immunity inquiry),

Although subjective intent is generally irrelevant to the inquiry into objective reasonableness, it is relevant where intent is an element of the constitutional claim. *Locurto v. Safir*, 264 F.3d 154, 168-69 (2d Cir. 2001). [W]here, as here, specific intent is actually an element of the plaintiffs claim as defined by clearly established law, it can never be objectively reasonable for a government official to act with the intent that is prohibited by law." *Reuland v. Hynes*, 460 F.3d 409, 419 (2d Cir. 2006); *see Crawford-El v. Britton*, 523 U.S. 574, 593-94 (1998) (plurality opinion) (rejecting notion that qualified immunity applies when official's conduct is objectively valid regardless of improper intent).

3. Constitutional Claims

Whether Plaintiff have alleged a constitutional violation is "a threshold inquiry in analyzing an assertion of qualified immunity." *Blue v. Koren*, 72

F.3d, 1075, 1080 (2d Cir. 1995). Plaintiffs allege causes of action for First Amendment retaliation, violation of Fourteenth Amendment due process rights, and violation of the Equal Protection Clause of the Fourteenth Amendment. To state a claim for First Amendment retaliation, a plaintiff must demonstrate that: "(1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination." *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999); *accord Singh v. City of New York*, 524 F.3d 361, 372 (2d Cir. 2008). To state a Fourteenth Amendment due process claim, a governmental employee must establish that he has aproperty interest, of which he was deprived without notice and an opportunity to be heard. *See DeMasi v. Benefico*, 567 F. Supp. 2d 449, 454 (S.D.N.Y. 2008) (citing *Locurto*, 264 F.3d at 171). Finally, to state an equal protection claim, a public employee must allege that he or she was arbitrarily or maliciously treated differently from other similarly-situated employees based on his or her membership in a particular class. *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2148, 2155 (2008); *see Appel. v. Spiridon*, 531 F.3d 138, 141 (2d Cir. 2008) (overruling any Second Circuit precedent to extent it conflicts with holding of *Engquist*).

B. Analysis

Plaintiffs' constitutional claims are based on: (1) Defendants' termination of Mr. Pavone's 207-c benefits; (2) Defendants' refusal to provide to the State factual data required to process Mr. Pavone' s application for non-disability retirement; and/or (3) Defendants' denial of Workers' Compensation benefits to Mr. Pavone. Defendants assert that they are entitled to qualified immunity because their actions were objectively reasonable in light of the legal rules that were clearly established at the time the actions were taken.

1. Termination of 207-c Benefits

Defendants argue that they are entitled to qualified immunity with respect to Plaintiffs' Constitutional claims based on the Town's alleged retaliatory termination of Mr. Pavone's 207-c benefits because Defendants acted in good faith, without malice, and in reasonable reliance on the advice of counsel when they, in the exercise of their discretion, terminated those benefits. They assert that Plaintiffs have not submitted any evidence raising an issue of fact as to the terms of the 207-c Stipulation, the exhaustion of Mr. Pavone's administrative remedies with respect to his applications for disability retirement under the terms of the Stipulation, and Defendants' reliance on the advice of outside counsel in discontinuing Mr. Pavone's 207-c benefits.
The following relevant facts are undisputed. The 207-c Stipulation provides:

> It is expressly acknowledged by Mr. Pavone that if he fails to receive a disability retirement having exhausted his administrative remedies prior to an Article 78 proceeding. that The Town of Cortlandt may unilaterally discontinue his 207-c salary benefits without the need of an administrative hearing. The Town will not be under an obligation to pay Mr. Pavone his salary during the pendency of an Article 78 proceeding.

(Statement of Facts ¶6, Ex. K ¶7; Counterstatement of Facts ¶5.) The 207-c Stipulation expressly contemplated that Mr. Pavone would apply for disability retirement based on "disability incurred in the performance of duty of accidental disability." (Statement of Facts ¶6, Ex. K ¶2; Counterstatement of Facts ¶5.) Mr. Pavone's application for accidental disability retirement was administratively denied on March 10, 2000. (Statement of Facts ¶7, Ex.

L.;Counterstatement of Facts ¶ 5.) The New York State and Local Retirement System could find no evidence that Mr. Pavone requested a hearing regarding the denial of this application within the designated time frame —four months from the administrative decision —which has passed. (Statement of Facts ¶¶ 9-10, Ex. N; Counterstatement of Facts ¶5.) Mr. Pavone's application for performance of duty disability retirement was denied on April 18, 2005. (Statement of Facts ¶8, Ex. M; Counterstatement of Facts ¶5.) Mr. Pavone commenced an Article 78 proceeding to challenge that denial (Statement of Facts ¶9, Ex, N; Counterstatement of Facts ¶ 5), but never perfected it (Statement of Facts ¶ 13, Ex. Q; Stolzer Aff. ¶¶ 6-8). Based on these undisputed facts, Mr. Pavone's original applications for disability retirement have been denied and his administrative remedies in .connection therewith have been exhausted. In these circumstances, the Individual Defendants' termination of Mr. Pavone's 207-c benefits without a hearing, as the 207-c Stipulation permitted, was objectively reasonable.

In support of their argument for qualified immunity, the Individual Defendants asserted reliance on the advice of counsel. They submitted documentation showing that Defendant Wood, the Town Attorney, sought advice from Ernest Stolzer, Esq, of the law firm of Bond, Schoeneck & King, LLC regarding whether the Town could properly terminate Mr. Pavone's 207-c benefits under the terms of the Stipulation (Statement of Facts ¶ 11, Ex, O Counterstatement. of Facts ¶ 5; Stolzer Aff, ¶4); that Mr. Stolzer provided advice to the Town via a four-page letter that concluded that "our opinion is the Town does have a solid argument that the Stipulation has not been violated if the Town Board decides to stop his wages and Pavone brings an action in court for breach of the Stipulation" (Statement of Facts¶14, Ex. R; Stolzer Aff.¶ 9); and that the Town Board's resolution terminating Mr. Pavone' s 207-c benefits referred to Mr. Stolzer's retention and advice (Statement of Facts ¶ 15, Ex. S; *see* Wood Aff. ¶ 14). Plaintiffs argue that

there is no evidence that the Individual Defendants actually relied on Mr. Stolzer's advice because there are no affidavits from them to that effect. Even without such affidavits, however, it is clear from the resolution itself that Mr. Stolzer's advice was relied upon. Moreover, Defendants submitted with their reply papers an affidavit from Defendant Wood stating, among other things, that he presented Mr. Stolzer' s opinion and recommendation to the Town Board and that the Board, based on that recommendation, voted to pass the resolution terminating Mr. Pavone's 207-c benefits. (Wood Affl ¶ 14).[5] But even if there was, in fact, no evidence that the Board relied on the advice of counsel in terminating Plaintiff's benefits, the terms of the 207-c Stipulation alone, when viewed in light of the undisputed facts relating to the denial of Mr. Pavone's applications for accidental disability or performance of duty disability retirement, suffice to establish the objective reasonableness of the Individual Defendants' actions.

Plaintiffs argue that Mr. Pavone's affidavit creates an issue of fact with respect to Defendants' reliance on the advice of counsel in discontinuing his 207-c benefits, and that that issue precludes summary judgment on grounds of qualified immunity. In his affidavit, Mr. Pavone swears that during a recorded telephone conversation on February 26, 2008, Warren Roth, his attorney in connection with his applications for disability retirement, informed him that: (1) Mr. Stolzer had told Mr. Roth that Mr. Stolzer agreed that Mr. Pavone's administrative remedies had not been exhausted; (2) Mr. Stelzer told Mr. Roth that Mr. Stolzer had informed the Town Board that it would be "vulnerable" if it terminated Mr. Pavone's benefits and that the Town Board had ignored that advice; and (3) another attorney informed Mr. Roth that Edmund

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[5] Pursuant to Rule 2.B of this Court's Individual Practices, Plaintiffs could have sought the Courts permission to file a sur-reply if they wished to challenge evidence presented for the first time in Defendants' reply.

Caplicki, attorney for the individual Defendants, was fired (at least temporarily) because he also advised Defendants against removing Mr. Pavone from payroll because doing so would be unlawful. (Pavone Aff.¶¶ 7-8.) Mr. Pavone also swears that in another recorded conversation on September 26, 2008, Mr. Roth advised Mr. Pavone that: (1) Victoria Manes, the attorney who represents the Town with respect to Workers' Compensation and 207-c benefits, informed Mr. Roth that she had spoken with Defendant Wood and advised him that removing Mr. Pavone from the payroll was illegal; (2) Ms, Manes will not tell the truth regarding her advice to Wood because she fears losing the Town and others as clients; (3) Mr. Roth would not voluntarily provide a truthful affirmation out of fear that Mr. Stolzer would not negotiate with him in the future; and (4) Mr. Pavone should depose both Mr. Roth and Ms. Manes to force them to disclose the truth. (*Id.* 9.)

Notwithstanding Mr. Pavone's affidavits, Plaintiffs have not submitted any admissible evidence to raise an issue of fact with respect to Defendants' request for and reliance on the advice of outside counsel regarding the termination of Mr. Pavone's 207-c benefits. Mr. Pavone's rendition of Mr. Roth's out-of-court statements is itself hearsay, but even if that level of hearsay is ignored, and one indulges the assumption that Mr. Roth would testify under oath to the statements Mr. Pavone attributes to him, Mr. Roth's rendition of what Mr. Stolzer, Ms. Manes and an unnamed attorney supposedly said is also rank hearsay. Plaintiffs offer these out-of-court statements for their truth, *see* Fed. R Evid. 801(c), and have identified no exception to the hearsay rule that might justify their admission. Accordingly, they are inadmissible hearsay and may not be considered. *See Major League Baseball Props., Inc.*, 542 F.3d at 310 ("Hearsay testimony that would not be admissible if testified to a trial may not properly be set forth in the

Rule 56(e) Affidavit." (Internal quotation marks and alterations omitted).[6]

In sum, Plaintiffs do not dispute that Mr. Pavone's applications for accidental and performance of duty disability retirement have been denied and that the time for any additional administrative remedies with respect to those applications has passed. Plaintiffs also do not deny that the Stipulation provides that Mr. Pavone's 207-c benefits may be terminated without a hearing upon the denial of his application for disability retirement and the exhaustion of his administrative remedies, not including any Article 78 proceedings.[7] Moreover, Mr. Pavone has not presented any admissible evidence to raise an issue of material fact as to the Individual Defendants' reliance on the advice of outside counsel in resolving to terminate his benefits. While Defendants' reliance on the advice of counsel is not dispositive, it supports the objective reasonableness of their actions. *See Cahill*, 7 F. Supp. 2d at 351 n.6.

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[6] Defendants submitted affidavits by Mr. Stolzer, Ms. Manes, Mr. Caplicki and Mr. Wood denying the statements and actions attributed to them by Mr. Pavone in his affidavit. (Stolzer Aff. ¶ 14; Manes Aff. ¶14; Caplicki Reply Affirmation ¶¶ 5-7; Wood Aff. ¶¶ 5-10.) Because the hearsay in Mr. Pavone's affidavit must be disregarded, any factual dispute over the accuracy of the affidavit or of the statements of Mr, Roth contained within it need not be resolved and does not preclude the granting of summary judgment.

[7] Mr. Pavone's disability counsel, Mr, Roth, apparently argued to the Town that Mr. Pavone had not exhausted his administrative remedies because he had chosen to file a new application for disability ratherthan pursue his remedies under Article 78 with respect to the original application. (Statement of Facts ¶13, Ex. Q.) His counsel in this Court wisely does not pursue that argument because it is plain that the 207-c Stipulation contemplated only one round of disability applications, which if denied and exhausted, would permit termination of Mr. Pavone's benefits, (*Id.*¶ 2, Ex. K.) If commencing a new application following an unsuccessful application were sufficient to render the original application unexhausted, Plaintiff could, through the device of repeated filings, stay on the Town's payroll forever.

This leaves Plaintiffs' argument that even if the termination was legally permissible under the terms of the 207-c Stipulation, Defendants acted with the improper intent to retaliate against Mr. Pavone for Ms, Pavone's protected speech. Such subjective bad intent precludes a finding of objective reasonableness, because it cannot be reasonable to act with an unconstitutional motive[8] As discussed above (Section II.A.2), Plaintiffs are, correct that where, as here, intent is an element of the constitutional. claim, Defendants' subjective intent to retaliate for protected speech precludes a finding of qualified immunity.[9] Likewise, where there is no evidence of unconstitutional intent, there is no basis to find Defendants' conduct unreasonable in relation to Plaintiffs' clearly established rights. *See P.C. v. McLaughlin*, 913 F.2d 1033, 1042 (2d Cir. 1990). Because there has been no discovery as yet,[10] the Court will assess this issue taking the allegations of the First

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[8]Plaintiffs' contention as to subjective bad intent applies only to the first, second, third, fourth, sixth and seventh causes of action, which. allege retaliation and equal protection claims with intent components, see Locurto, 264 F.3d at 169-70 (specific illegal intent an element of retaliation and possibly equal protection claims), but not the fifth cause of action, which alleges a due process violation and does not have an intent element.

[9] There is no question that a public official's obligation to refrain from retaliation for protected speech was clearly established at the time of the challenged conduct. *See, e.g., Glenview Constr. Inc. v. Bucci*, 165 F. Supp. 2d 545, 555 (S.D.N.Y. 2001).

[10] Defendants made their Motion pursuant to Judge Brieant's May 16, 2008 Scheduling Order, which provides that, if Defendants plan to assert a qualified immunity defense, they must depose Plaintiffs within thirty days of the issuance of the Scheduling Order and, within thirty days of that deposition, file a motion to dismiss on the basis of qualified immunity, or waive that pre-trial defense. (Doc. 14.)

Amended Complaint as true, as it would on a motion to dismiss, *see Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178,180 (2d Cir. 2008) (when reviewing motion to dismiss, facts alleged in complaint are accepted as true), and as the May 16, 2008 Scheduling Order requires.[11]

"In order to survive a motion to dismiss, a plaintiff claiming First Amendment retaliation must allege facts sufficient to support an inference that his protected conduct played a substantial part in the adverse action taken against him."[12] *El-Bey v. City of New York*, 419 F. Supp. 2d 546, 552 (S.D.N.Y. 2006). The Complaint alleges no such facts. It claims only in wholly conclusory fashion that "[a]s a proximate result of [Ms]. Pavone' s activities as a union representative," Defendants' terminated Mr. Pavone's 207-c benefits. (Compl.¶15.) This allegation is just the sort of "bald and uncorroborated allegation of retaliation" that is "inadequate to withstand a motion to dismiss." *Butler v. City of Batavia*, 545 F. Supp. 2d 289, 293 (W.D.N.Y. 2008). Nor have Plaintiffs pleaded "facts from which a retaliatory intent...reasonably may be inferred,"

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[11] The May 16, 2008 Scheduling Order provides that Plaintiff's "version of the events shall be assumed true for purposes of the [qualified immunity] motion." (Doc. 14.)

[12] The Court recognizes that whether Plaintiffs have alleged a constitutional violation is "a threshold inquiry in analyzing an assertion of qualified immunity." *Blue*, 72 F.3d at 1080. In this case, analysis of Plaintiffs' First Amendment claims, specifically whether a causal connection exists between Ms. Pavone's speech and the termination of Mr. Pavone's benefits, and Mr. Pavone's due process claim, specifically whether Mr. Pavone's benefits could be terminated without a hearing, are encompassed by the Court's inquiry into whether the Individual Defendants' termination of Mr. Pavone's benefits was objectively legally reasonable in light of clearly established law. The result would, therefore, be the same regardless of the order in which the Court analyzed the validity of the constitutional claims and the objective reasonableness of Defendants' actions in light of clearly established law.

Gagliardi v. Vill. of Pawling,18 F.3d 188, 195 (2d Cir. 1994), such as that "defendants [were] aware that plaintiff [had] engaged in protected speech and defendants' challenged behavior closely follow[ed) that protected speech," *Econ. Opportunity Comm'n of Nassau County, Inc. v. County of Nassau*, 106 F Supp.2d 433, 437 (E.D.N.Y, 2000). Plaintiffs have alleged nothing on the critical issue of Defendants' awareness of the speech. As to timing, Plaintiffs allege that Ms. Pavone's speech began in May 2007— at least nine months before the challenged action. "There is no bright line beyond which a temporal relationship is too attenuated to establish a retaliatory motive for adverse employment action, but courts in this Circuit have found that lapses of time from [three) months to one year are too attenuated to establish a retaliatory motive." *Amorosano-Lepore v. Generoso* No. 06-CV-1223, 2008 U.S. Dist. LEXIS 55641, at *24-25 (S.D.N.Y. July 18, 2008) (ten-month "time lapse between plaintiffs protected speech ... and the filing of disciplinary charges against her" was "not the close temporal proximity necessary to establish causation"). Plaintiffs do not allege specific instances of Ms. Pavone's speech, and while the Complaint arguably alleges ongoing speech (Ms. Pavone "assumed [Union] duties .. and in that connection vigorously and zealously advocated . . against the Town on a variety of contentious issues" (Compl.¶14)), no time frame is alleged. Accordingly, Plaintiffs have not alleged a temporal connection sufficient to establish causation. *See Morey v. Somers Cent. Sch. Dist.*, 06-CV-1877, 2007 U.S. Dist. LEXIS 20265, at *42-43 (S.D.N.Y, Mar, 21, 2007) (no facts evidencing that defendants' animus toward plaintiff arose from latter's union activities, and disciplinary action came more than a year after plaintiff assumed union office),[13] Accordingly, no

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[13] The hearsay statements previously discussed, even if admissible would provide no evidence of retaliatory motive because they do not in any way indicate that Mr, Pavone's benefits were terminated based on Ms. Pavone's union activities.

reasonable jury, accepting Plaintiffs' allegations as true and viewing them in the light most favorable to Plaintiffs, could conclude that the Individual Defendants' termination of Mr. Pavone's benefits was retaliatory or otherwise objectively unreasonable in light of clearly established law, *See Husain,* 494 F.3d at 131. The Individual Defendants are, therefore, entitled to qualified immunity with respect to the first, second, and third causes of action.

With respect to Plaintiffs' fourth cause of action — an equal protection claim based on the termination of Mr. Pavone's 207-c benefits — Plaintiffs do not allege Mr. Pavone's membership in any particular class, but rather that he was treated differently from similarly-situated employees based on retaliatory animus. (Compl. ¶¶ 27-30.) A public employee cannot state a claim under the Equal Protection Clause by alleging that he was maliciously treated differently from other similarly-situated employees without an assertion that the different treatment was based on the employee's membership in any particular class, *Engquist*, 128 S. Ct, at 2148. Plaintiffs have not, therefore, alleged a cognizable equal protection claim and Defendants are entitled to qualified immunity with respect to their fourth cause of action. *See Blue*, 72 F.3d at 1080 ("a threshold inquiry in analyzing an assertion of qualified immunity is whether the plaintiff has alleged a constitutional violation").

With respect to Plaintiffs' fifth cause of action -a due process claim arising from the alleged deprivation of Mr. Pavone's 207-c benefits without a pre-deprivation hearing—specific intent is not an element, and therefore the Individual Defendants' subjective intent is not at issue. Their conduct was objectively reasonable because termination of Mr. Pavones benefits without a hearing was permitted under the 207-c Stipulation, as detailed above, and accordingly, they are entitled to qualified immunity on this claim as well.

2. Refusal to Provide Factual Data to the New York State Retirement System

Plaintiffs allege in their sixth cause of action that Defendants' retaliatory refusal to provide factual data to the New York State Retirement System violated his First Amendment rights. (Compl. ¶ 33-34) Defendants have, however,. presented evidence indicating that The New York State Retirement System confirmed receipt from the Town of all requested materials relating to Mr. Pavone's non-disability application. (Statement of Facts ¶ 23, Ex. X) Plaintiffs do not deny that the New York State Retirement System is in receipt of all the materials requested from the Town, nor do they present any evidence showing Defendants' failure to deliver the requested data. Accordingly, Plaintiffs have not presented evidence or raised a material issue of fact as to an essential element of their First Amendment retaliation claim — that Mr. Pavane suffered an adverse employment decision. *See Morris*, 196 F.3d at 110. Defendants are, therefore, entitled to qualified Immunity with respect to the sixth cause of action. *See Woodlock v. Orange Ulster B. O.C. E.S.*, 281 F. App'x 66, 68 (2d Cir. 2008) (no further inquiry into qualified immunity was necessary where plaintiff failed to raise material issue of fact as to essential element of First Amendment retaliation claim).

3. Denial. of Workers' Compensation Benefits

Finally, with respect to the seventh cause of action, Plaintiffs allege that Defendants' retaliatory denial of Workers' Compensation benefits to Mr. Pavone violated his First Amendment and equal protection rights. Defendants assert that Mr. Pavone's request for Workers' Compensation benefits from the Town has not been decided and is not properly, at issue in this action. Plaintiffs deny that Mr. Pavone's request for Workers' Compensation benefits is still pending, The only evidence regarding the alleged denial of Workers' Compensation benefits offered by the Parties is a series of letters to the Court, which were sent pursuant to the Court's request during oral argument

on this Motion on November 21, 2008, that Defendants submit a letter regarding the status of Mr. Pavone's application for Workers' Compensation benefits. Defendants' counsel submitted a letter dated November 25, 2008, which indicates that Mr. Pavone wrote a letter dated March 7, 2008, to the Town of Cortlandt demanding Workers' Compensation benefits, but did not follow that letter up with any formal application. The November 25, 2008 letter also states that the Town is self-insured and that Triad Group, LLC is the Third Party Administrator licensed by the Workers' Compensation Board. Plaintiffs submitted a letter in response dated November 26, 2008, which states that the Town is not subject to the jurisdiction of the Workers' Compensation Board. It also indicates that Mr. Pavone's March 7, 2008 letter demanding Workers' Compensation benefits prompted a medical examination by a doctor selected by the Town who concluded that Mr. Pavone has a "moderate partial disability." The letter also attaches an email sent from Mr. Roth to Mr. Pavone on May 16, 2008, stating that Triad Group, LLC informed him that the Town is refusing to pay Mr. Pavone Workers' Compensation benefits while this litigation is pending. Finally, the letter states that no formal application is required for Workers' Compensation benefits.[14]

Plaintiffs have offered some evidence, specifically Mr. Pavone's March 7, 2008 letter, to show that Mr. Pavone applied for Workers' Compensation benefits and has not received them. Accordingly, Plaintiffs have raised an issue of fact with respect to an element of Plaintiffs' First Amendment retaliation claim — that Mr. Pavone suffered an adverse

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[14] Defendants submitted a letter dated December 1, 2008, in response to Plaintiffs' November 26, 2008 letter, which references the requirements of the 207-c Stipulation and states that Defendants complied with it, and also argues that the medical proof required to obtain a performance of duty disability retirement pension is "permanently incapacitated for the performance of duties" and moderate or partial disability."

employment action. As explained above (Section II.B.1), however, Plaintiffs fail to demonstrate an essential element of their First Amendment retaliation claim--that there is a causal connection between Ms. Pavone's speech and the purported denial of Mr. Pavone's Workers' Compensation benefits. *See Morris*, 196 F.3d at 110.[15] Plaintiffs have, therefore, failed to state a First Amendment retaliation claim based on the denial of Workers' Compensation benefits, and Defendants are entitled to qualified immunity with respect to the seventh cause of action. *See Munafo*, 285 F.3d at 211 (defendant is entitled to qualified immunity where the complaint does not allege a cognizable federal claim).

Conclusion

The individual Defendants' Motion for Summary Judgment on the basis of qualified immunity is granted. The Clerk of the Court is respectfully directed to terminate the pending Motion (Doc. 22). The Parties are to appear for a status conference on December 22, 2009 at 9:30 a.m.

SO ORDERED.

Dated: December 4, 2008
White Plains, New York

CATHY SEIBEL, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Robert L. Pavone, Valerie V. Pavone

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[15] Plaintiffs in the seventh cause of action do not specify the First Amendment activity to which they are referring, but the Complaint describes no such activity other than Ms. Pavone's.

Plaintiffs,

- against - 08-cv-02389 (CS)

Linda Puglisi, individually, Ann Lindau, individually, Francis X. Farrell, individually, John Sloan, individually, Thomas Wood, individually, Town of Cortlandt

Filed Dec 23 2008

Defendants.

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JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Cathy Seibel, U.S.D.J and the Court thereafter on December 22, 2008, having handed down its memorandum to the docket clerk granting defendant's oral motion to dismiss, without prejudice to reinstate if the Second Circuit reverses Judge's Seibel's December 4, 2008 ruling, or this ruling directing the Clerk to close this case it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

Dated: White Plains, New York
December 23, 2008

J. Michael McMahon
Clerk
E.O.D